OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 1, 2003

Ms. Marianna M. McGowan
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2003-2939

Dear Ms. McGowan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181545.

The McKinney Independent School District (the "district"), which you represent, received two requests for information relating to a district investigation involving a named employee and a named student. The requestors are the student's legal guardians and an attorney representing the interests of the minor student. You indicate that some responsive information has been released. You claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.114, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that the submitted documents are subject to the Family Educational Rights and Privacy Act of 1974 ("FERPA") in their entirety. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). "Education records" are those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Information relating to a student must be withheld from required public disclosure under FERPA to the extent

"reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978).

Under FERPA, a student's parents or guardians have an affirmative right of access to their child's education records. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3 ("parent" includes legal guardian of student). However, the right of a student's guardians to inspect or review their child's education records does not extend to information in the student's records that identifies other students. *See* 34 C.F.R. § 99.12(a) ("If the education records of a student contain information on more than one student, the [guardian] or eligible student may inspect and review or be informed of only the specific information about that student."). FERPA also provides that an educational agency may release a student's educational records upon receipt of written consent from the student's guardians specifying "the records to be released, the reasons for such release, and to whom, with a copy of the records to be released to the student's [guardians] and the student if desired by the [guardians]." 20 U.S.C. § 1232g(b). With one exception, the submitted documents relate directly to the guardians' child. We have marked a document that pertains solely to another district student, and consists of information identifying that student. This document is confidential under FERPA and must be withheld from all of the requestors in this case.

With respect to the remainder of the submitted documents, we first consider the request submitted by the guardians of the named student at issue. As noted, the guardians have a right of access to their child's education records, but this right of access does not extend to information in the records that identifies other students. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.12(a). We have marked information in the submitted documents identifying other district students. The district must withhold the marked information pursuant to FERPA. The submitted documents also include several handwritten statements created by students other than the requestors' child. This office has determined that a handwritten document created by a student tends to identify that student. *See* Open Records Decision No. 224 (1979) (student's handwritten comments excepted from disclosure by statutory predecessor to section 552.114). Accordingly, district must also withhold the handwritten documents we have marked pursuant to FERPA. We note that the remaining documents also contain information identifying certain other individuals, which we have marked. We are unable to determine from the information submitted whether these other individuals are students. Consequently, if the district determines that the identifying information we have marked pertains to students, the district must withhold this information under FERPA.

We next consider the request of the attorney requestor. Under FERPA, the district must release a student's education records to a third party requestor upon receipt of the proper written consent of the student's parents or guardians. 20 U.S.C. § 1232g(b). Consequently, if the district receives the proper written consent of the named student's guardians, the district must release the remaining submitted documents to the attorney requestor as marked. If the district does not receive the guardians' consent to release the documents to the attorney requestor pursuant to section 1232g, the district must withhold the information in the

documents that is confidential under FERPA from the attorney requestor. In general, only information identifying the named student would be protected by FERPA. In this case, however, the attorney requestor knows the identity of the subject of the records. Thus, only withholding the named student's identifying information from the education records would not suffice to protect the student's privacy. Thus, if the district does not receive the guardians' proper written consent to release their child's education records to the attorney requestor, the district must withhold the submitted records from the attorney requestor in their entirety.

Next, we consider whether the information that is subject to release under FERPA is excepted from disclosure under section 552.135 of the Government Code. Section 552.135 provides:

> (a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.
>
> (b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].
>
> (c) Subsection (b) does not apply:
>
> > (1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or
> >
> > (2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or
> >
> > (3) if the informer planned, initiated, or participated in the possible violation.
>
> (d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.
>
> (e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under section 552.135 must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A).

As noted, the submitted documents are subject to FERPA. Information identifying students other than the named student who is the subject of the request is confidential under FERPA and must be withheld, as discussed above. Accordingly, we need not reach your claim under section 552.135 with respect to information identifying students other than the named student at issue.

With respect to information identifying the named student who is the subject of the request, as well as information in the submitted documents identifying several district employees, we must address your section 552.135 claim in light of the requestors' rights of access under FERPA. As noted, the guardians of the named student have an affirmative right of access under FERPA to the documents relating to their child, and the attorney requestor may have a similar right of access in this case. Where a state statute, such as section 552.135 of the Government Code, conflicts with FERPA, the federal law prevails. *See, e.g., Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995); *see also* Open Records Decision No. 431 (1985) (FERPA prevails in conflict with state law). Consequently, information identifying the named student at issue, and the identities of district employees appearing in the submitted documents, may not be withheld pursuant to section 552.135 of the Government Code in this case.

Next, we address your claim under common-law privacy. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

You state that the submitted documents pertain to the district's investigation of an allegation that the named employee at issue was involved in a sexual relationship with the named student. In *Morales v. Ellen,* 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the

person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Here, because there is no adequate summary of the investigation, the information in the submitted documents would generally be subject to disclosure. However, under the decision in *Ellen*, the identities of victims and witnesses to alleged sexual harassment would be protected by common-law privacy. *See Ellen*, 840 S.W.2d at 525. We note that several of the witnesses identified in the submitted documents are students. We determine that these students' identities are adequately protected by FERPA in this case, as discussed above. The guardians of the named student and the attorney requestor, as representatives of the alleged student victim, would have a right of access to information identifying the named student pursuant to section 552.023 of the Government Code. *See* Gov't Code § 552.023 (an individual, or the individual's authorized representative, has a special right of access to information that is excepted from public disclosure under laws intended to protect the individual's own privacy interest as the subject of the information). Thus, the victim's identity is not excepted from disclosure pursuant to common-law privacy in this case. Furthermore, the identity of the named employee is subject to a legitimate public interest and may not be withheld under common-law privacy. *See Ellen*, 840 S.W.2d at 525. However, we must address whether information identifying other individual witnesses in the submitted documents is protected by common-law privacy.

In considering this question, this office consulted with the Family Policy & Regulations Office of the United States Department of Education ("DOE"). The DOE advised that a parent or guardian's affirmative right of access to their child's education records generally prevails over state statutory and decisional law that conflicts with that right of access. Pursuant to the Supremacy Clause of the United States Constitution, state law that conflicts with federal law is preempted and has no effect. *See* U.S. Const. art. VI, cl. 2; *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Federal law or regulations may impliedly preempt state law if a federal statute's scope indicates that Congress intended federal law or regulations to occupy the field exclusively, or if state law actually conflicts with federal law or regulations. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (in cases of actual conflict, where complying with both state and federal requirements is impossible, state law is preempted by federal law). The U.S. Supreme Court has held that federal law impliedly preempts conflicting state common-law rules, as well as state statutory law. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000) (ordinary preemption principles apply to state common-law tort actions that conflict with federal regulations); *see also Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 779 (3rd Cir. 1992); *Great Dane Trailers v. Estate of Wells*, 52 S.W. 3d 737, 743 (Tex. 2001) (state common-law actions that conflict with federal law are subject to preemption under the Supremacy Clause). Based on our consultation with the DOE and our review of the pertinent federal precedent, we determine

that the district may not withhold information identifying individuals in the submitted documents pursuant to section 552.101 of the Government Code in conjunction with the doctrine of common-law privacy.

In summary, with respect to the request submitted by the guardians of the named student at issue, we have marked information identifying other students that the district must withhold under FERPA. Furthermore, we have marked additional identifying information that may pertain to students. If the district determines that this information identifies students, the district must withhold the information pursuant to FERPA. The district must release the remainder of the submitted information to the guardians of the named student pursuant to the guardians' right of access under FERPA. With respect to the request submitted by the attorney requestor, if the district receives the guardians' proper written consent to release their child's education records to the attorney requestor, the district must release the named student's education records to the attorney requestor as marked. Otherwise, the district must withhold the submitted information from the attorney requestor in its entirety pursuant to FERPA.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 181545

Enc: Submitted documents

c: Mr. Joel Peterson
Ms. Belinda Peterson
c/o Mr. Todd R. Hixon
(w/o enclosures)

Mr. Todd R. Hixon
Bellinger & DeWolf, L.L.P.
10000 North Central Expressway, Suite 900
Dallas, Texas 75231
(w/o enclosures)